IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

MONDAY, THE 12TH MARCH 2007 / 21ST PHALGUNA 1928

Ins.APP.No. 60 of 2003()

IC.9/2001 of ESI COURT, PALAKKAD

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APPELLANT/APPLICANT:

M/S. ALUKKAS GOLD SOUK,
THRISSUR ROAD, KUNNAMKJULAM, REP. BY
ITS MANAGING PARTNR, A.V. ANTO.

BY ADV. SRI.M.P.ASHOK KUMAR

RESPONDENT/OPPOSITE PARTY:

EMPLOYEES INSURANCE CORPORATION,
REGIONAL OFFICE, SWARAJ ROUND NORTH,
THRISSUR-20, REP. BY ITS REGIONAL DIRECTOR.

BY ADV. SMT.T.D.RAJALAKSHMY, SC, ESI CORPN.

THIS INSURANCE APPEALS HAVING BEEN FINALLY HEARD ON 12/03/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.PADMANABHAN NAIR,J.

INS. APPEAL NO. 63 OF 2003

Dated this the 12th day of March, 2007

J U D G M E N T

The employer against whom respondents have passed order calculating damages under Section 85-B of the ESI Act is the appellant. His challenge before the Employees Insurance Court is against that order. Hence he has filed this Insurance Appeal.

2. The Corporation claimed contribution from 17.8.1998 till July, 2000. There was dispute regarding the period. The stand taken by the petitioner is that though he was prepared to pay the contribution, the respondent did not receive the same. There was dispute regarding the liability to pay contribution for the period from 17.8.1998 to 18.6.2000. The Corporation demanded the amount on 17.8.1998. The appellant paid the same on 16.8.2000. Thereafter, the Corporation claimed an amount of Rs. 70,000/- by way of the damages for the delayed payment. It is true that Section 85-B confers a power on the Corporation to recover the damages. Section 85-B reads as follows:-

> "Where an employer fails to pay the amount due in respect of any contribution or any other amount payable under this Act, the Corporation may recover from the employer by way of penalty such damages not exceeding the amount of arrears as may be specified in the regulations.
>
> Provided that before recovering such damages, the employer shall be given a reasonable opportunity of being heard;
>
> Provided further that the Corporation may reduce or waive the damages recoverable under this Section in relation to an establishment which is a sick industrial company in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under Section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in regulations.
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> (2) Any damages recoverable under sub-section (1) may be recovered as an arrear of land revenue"**.**

3. A Division Bench of this Court interpreting Section 85-B in Regional Director, E.S.I. Corporation Vs. Sakti Tiles [1998 (2) KLT 280] held that though the Corporation has such a power it is seen that the Corporation cannot act mechanically. It was held as follows:

> "A mere look at S.85B will show that even where the employer fails to pay the amounts due in respect of any contribution payable under the Act, it is not obligatory on the Corporation to levy or recover damages.

> The power to levy damages is discretionary. The section has only stated, the maximum amount that can be so recovered. The power to levy and recover damages provided in S.85-B of the Act is in the nature of a quasi-penal provision. An order, levying damages for failure to pay the amount due in respect of any contribution payable under the Act, is a quasi judicial proceeding. Since the failure to carry out the statutory obligation should be adjudicated by a quasi judicial enquiry, and the levy of damages is quasi-penal in character, we are of the view that such damages will not ordinarily be imposed unless the party obliged to pay the amount due, acted either deliberately or in defiance of law, or was guilty of contumacious or dishonest conduct, or acted in conscious disregard of its obligation. The mere fact, that the Corporation is empowered to recover damages, does not mean that the Corporation can act mechanically and without taking into account the facts and circumstances of each case."

4. According to the petitioner, the order was passed without issuing any notice and against the violation of the principles of natural justice. It is disputed by the Corporation and it is contended that notice was properly served. The Employees Insurance Court also found that notice was accepted by the cashier of the appellant and there was proper service. But considering the fact that the quantum fixed as interest is simply taken as the damages, I am of the view that it is only just and proper that the appellant is given another opportunity to present

his case, if any, before the Corporation.

5. In the result, Insurance Appeal is allowed. The order passed by the Regional Director, E.S.I. Court is hereby set aside. The Regional Director is directed to pass fresh orders after giving reasonable opportunity to the petitioner to present his case in accordance with law. I make it clear that petitioner is not entitled to any fresh notice and he shall appear before the Regional Director, within two months from the date of receipt of a copy of this judgment and file objections, if any, and produce documents. If such a petition is filed and he produces documents, the Regional Director shall give the appellant an opportunity to adduce evidence, if any, and pass orders.

K.PADMANABHAN NAIR, JUDGE

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